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Motion for Written Pre-Voir Dire Juror Questionnaire

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FILED IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

1999 DEC 21 D 1:26

ALAN J. DAVIS, Special Administrator
of the Estate of SAMUEL H. SHEPPARD

Plaintiff

-vs-

STATE OF OHIO

Defendant

CASE NO. 312322

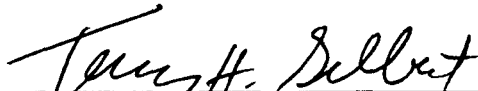
JUDGE RONALD SUSTER

MOTION FOR WRITTEN
PRE-VOIR DIRE JUROR
QUESTIONNAIRE

The Plaintiff respectfully moves this Court for its order directing:

1. That the written Juror Questionnaire attached to this Motion and Memorandum be submitted to prospective jurors in this case.
2. That prospective jurors who state, in response to a question on the Juror Questionnaire, that they would prefer not to discuss the issues in the Questionnaire in front of other members of the jury panel, be questioned about their experiences and the possible effect their experiences may have on their ability to hear and decide this case in a fair and impartial manner out of the hearing of the panel of other prospective jurors.
3. That copies of the completed Questionnaires be made and distributed to the attorneys for the parties in this case.
4. That the information contained in the Questionnaires concerning the prospective jurors' experiences and attitudes shall not be disclosed to any person other than the attorneys for the parties, their staff and the parties themselves.

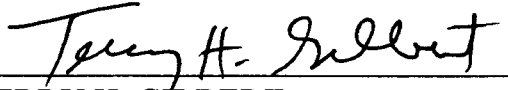
Respectfully submitted,



TERRY H. GILBERT (0021948)
GORDON S. FRIEDMAN (0021946)
Attorneys for Plaintiff
1700 Standard Building
1370 Ontario Street
Cleveland, OH 44113
(216) 241-1430

CERTIFICATE OF SERVICE

A copy of the foregoing Motion for Written Pre-Voir Dire Juror Questionnaire has been hand-delivered, this 21 day of December, 1999, to Marilyn Cassidy, Esq., Assistant Prosecuting Attorney, Justice Center, 1200 Ontario Street, Cleveland, Ohio 44113.



TERRY H. GILBERT
GORDON S. FRIEDMAN
Attorneys for Plaintiff

**MEMORANDUM IN SUPPORT OF MOTION FOR
PRE-VOIR DIRE JUROR QUESTIONNAIRE**

- 1. Plaintiff requests that the attached Juror Questionnaire be submitted to prospective jurors in this case prior to voir dire by the Court or the parties.**

The use of such a Questionnaire as part of the jury selection process is within the discretion of the Court provided by the Fifth and Seventh Amendments to the United States Constitution, which guarantee the right to a fair and impartial jury in civil cases.¹ Such Questionnaires are being routinely used in Federal, as well as State, judicial districts throughout the country.

A Juror Questionnaire will provide detailed answers without the risk of tainting other jurors. The potential for latent biases among jurors that will affect their ability to fairly decide this case justifies submission of a Juror Questionnaire.

The use of a Juror Questionnaire would aid in the efficient and fair selection of a jury panel to hear this case for the following reasons:

- 2. The proposed Questionnaire would increase the efficiency of the voir dire process.**

The Questionnaire covers basic demographic information and other relevant experiences which would otherwise be part of the oral voir dire. Attorneys conducting voir dire will not need to take up the jurors' or the courts' time asking the same questions of each prospective juror. Follow-up questions, based on responses to the Questionnaire, can be pursued in an efficient manner to complete the voir dire process.

- 3. In this case, there is a high probability that potential jurors have been exposed to pre-trial publicity or word-of-mouth discussions about the case.**

The use of a Questionnaire is appropriate in this case because of likelihood that potential jurors will have been exposed to publicity that has surrounded Dr. Sheppard's case since 1954. Anyone who was a resident of the Cleveland area during the original 1954 trial or the 1966 retrial is likely to have heard of the case, and possibly discussed it with others. Plaintiff requests that those prospective jurors who state they have been exposed to publicity, public sentiment or other people's opinions about the case be questioned about this matter out of the hearing of the panel of prospective jurors. Individual sequestered voir dire on these subjects would avoid unnecessary tainting of the panel and would further protect jurors' privacy.

¹ This principle was articulated in *Thiel v. Southern Pacific Company*, 328 U.S. 217, 220 (1946).

- 4. In this case, the Plaintiff is entitled to inquire into the attitudes and experiences of prospective jurors concerning police connections and contact, experience as crime victims, and attitudes toward the justice system in general.**

It is necessary to evaluate juror attitudes on these subjects because of their potential to produce predisposition or prejudice, which could easily affect jurors' abilities to decide this case fairly and impartially. Jurors' attitudes toward or connections to law enforcement have the potential to produce predisposition or prejudice, which could easily affect their ability to decide this case fairly and impartially. In addition, jurors' attitudes toward the criminal courts, civil lawsuits, and jury verdicts may have the potential to produce prejudice. In addition, it will be necessary to ask jurors about their experiences as crime victims. This is a potentially difficult issue for jurors to talk about. Some crime victims are very reticent to discuss their status in such an open setting in front of strangers.

The Plaintiff is entitled to in-depth questioning on these subjects to obtain relevant cause challenges, and also if we are to intelligently exercise our peremptory challenges.

- 5. It is easier for some jurors to provide answers to such sensitive questions on a written Questionnaire.**

Not only do they have more time to think about their answers, but they are not subject to the pressures of feeling "put on the spot" during oral questioning. Providing jurors with the opportunity to discuss these subjects in writing may be easier than describing their attitudes or experiences in open court. In addition, jurors may feel constrained in an open setting to expressing how much pre-trial publicity they have been exposed to or how strongly they feel about the case. They may attempt to minimize those factors in front of the group, whereas the Questionnaire will afford them more privacy.

- 6. The use of a confidential Questionnaire would protect and respect the privacy of potential jurors and, at the same time, meet the needs of the attorneys for the parties.**

Individual sequestered voir dire on the above subjects would avoid unnecessary embarrassment and would further protect jurors' privacy concerning these very personal and sensitive topics. These steps would meet the requirements of Standard 7(c) of the ABA Standards Relating to Juror Use and Management, which requires reasonable protection of juror privacy.

Plaintiff volunteers to do the necessary photocopying and distribution of the completed Questionnaires to the attorneys for the Defendant if the Court wishes. This will minimize the expense and burden on the Court's personnel.

For these reasons, Plaintiff requests that his Motion be granted.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Terry H. Gilbert", is written over a horizontal line.

TERRY H. GILBERT (0021948)

GORDON S. FRIEDMAN (0021946)

Attorneys for Plaintiff

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APPENDICES

1. ABA Standards Relating To Juror Use and Management. Standard 7.
2. Proposed Juror Questionnaire.

APPENDIX 1

RELEVANT EXCERPTS FROM:

AMERICAN BAR ASSOCIATION
“Standards Relating to Juror Use and Management”
Approved February, 1983

Standard 7: VOIR DIRE

Voir dire examination should be limited to matters relevant to determining whether to remove a juror for cause and to exercising peremptory challenges.

- a) To reduce the time required for voir dire, basic background information regarding panel members should be made available in writing to counsel for each party on the day on which jury selection is to begin.
- b) The trial judge should conduct a preliminary voir dire examination. Counsel should then be permitted to question panel members for a reasonable period of time.
- c) The judge should ensure that the privacy of prospective jurors is reasonably protected, and that questioning is consistent with the purpose of the voir dire process.
- d) In criminal cases, the voir dire process should always be held on the record. In civil cases, the voir dire process should be held on the record unless waived by the parties.

COMMENTARY

Generally

The voir dire process provides the court and the parties with the opportunity to question prospective jurors to discover conscious or subconscious preconceptions and biases or other facts related to selecting a fair and impartial jury. Voir dire is a valued and integral part of the adversary process and is necessary for the intelligent and effective exercise of challenges.²

Peremptory challenges are intended to be used, within certain restrictions, by counsel on the basis of subjective judgments about prospective jurors' possible attitudes toward the case or one of the parties. (See also Standard 9.) Counsel are entitled to a reasonable amount of information on which to base such judgments.

² *Swain v. Alabama*, 380 U.S. 202, 218-19 (1965); see also *Pointer v. United States*, 151 U.S. 396, 408-09 (1894); *Aldridge v. United States*, 283 U.S. 308 (1931).

...

Juror privacy is a difficult issue. It calls for a balance between the information needed by the parties to allow them to select fair and impartial juries and the right of privacy expected by each person called to serve. The court should assure that appropriate consideration is given to juror privacy by maintaining control of voir dire and restricting the lines of questioning to those issues that are legitimate ones in determining the jurors' ability to serve fairly and impartially. The court should protect the juror's privacy to the extent allowed by law and should limit probing into sensitive areas. The juror is called upon to perform a public service, and the court has the responsibility to protect him or her.³

Paragraph (a) *Provision of Background Information*

The standard suggests that jurisdictions provide counsel with basic background information regarding each member of the jury panel. Such information should include the age, gender, occupation, educational level, marital status, and prior jury service of the prospective juror, the geographic area in which the juror lives,⁴ the occupation of his or her spouse, if any, and the age of his or her children, if any.⁵ The standard recommends further that this information be turned over to counsel on the morning on which jury selection is to begin. This is consistent with the one-trial/one-day system urged in Standard 5 and reduces the opportunity for improper contact with panel members. No independent investigation by attorneys or any others is contemplated nor should it be countenanced by the court.

Making juror information available will eliminate the necessity for many commonly asked questions, thus expediting the voir dire examination.⁶ To realize this goal, it is essential that the trial judge not permit counsel to ask questions seeking information already available from the background questionnaire. In the exceptional case in which extensive information concerning the prospective jurors is necessary because of the notoriety of a party or the controversial nature of the matters at issue, a separate voir dire questionnaire should be prepared and submitted by the court to the jury panel when they report for voir dire. In these or other exceptional cases, the voir dire process may be recessed to permit counsel to evaluate the information provided on the questionnaire. When this

³ *Whalen v. Roe*, 429 U.S. 589, 599 (1977); *Nixon v. Administrator of General Services*, 433 U.S. 425, 457 (1977).

⁴ For reasons of privacy and safety, a panel member's address and telephone number should not be released.

⁵ See Standard 11: Notification and Summoning.

⁶ American Bar Association, Section on Criminal Justice, *Report to the House of Delegates* (approved Feb. 1981); American Bar Association, *Standards for Criminal Justice: Trial by Jury* (1986)[hereinafter cited as ABA, *Trial by Jury*]; see *United States v. Barnes*, 604 F.2d 121 (2d Cir. 1979)(Meskill, J., dissenting)(list of jurors results in narrowing the scope of voir dire).

is done, counsel should be admonished by the court not to contact prospective jurors during this recess.

Case-specific questionnaires may be used, but juror privacy should be carefully respected. One appellate court has suggested that the judge should assure that such questionnaires contain only questions usable during voir dire in open court.⁷ The case-specific questionnaire should not be an excuse to use questions that would not be appropriate in the courtroom in group or individual voir dire. The judge should review and approve all questionnaires. Recommended procedures for the use of these pre-screening questionnaires have been promulgated in the literature and case law.⁸ Opinion is divided as to whether questionnaires are part of the public record. In the interest of juror privacy, the court should, at most, retain questionnaires only of those jurors selected and those about whom a particular challenge is made.⁹

⁷ *State v. Thayer*, 528 S.2d 67 (1988).

⁸ A recent case of interest is *Copley Press, Inc. v. San Diego County Superior Court*, 223 Cal.App.3d 944, 273 Cal. Rptr. 22 (1990). In this incident pre-screening questionnaires containing 219 questions were used in a death penalty case for 300 prospective jurors. Copley Press filed a motion requesting the release of the questionnaires. The request was denied. The Superior Court recognized the right of access to the voir dire examination of the jury in a criminal trial. However, the court found that questionnaires were used to equalize access for the parties to jury backgrounds and that jurors had given open and complete information because of assurances in the instructions that they would be confidential. The California Supreme Court held that a blanket denial of access to the questionnaires was unconstitutional. However, due to the assurance given to the prospective jurors of confidentiality of the questionnaires, the questionnaires were not to be released. The court directed that in future cases in which jury questionnaires were used, the court should: (1) segregate juror qualification information from other questions; (2) plainly instruct the venire in the body of the questionnaire that written responses are not confidential and the venire have a right to request an *in camera* hearing to discuss their responses to any questions they do not wish to answer in writing; and (3) provide public access to the questionnaire. This decision places further demands upon the court to assure that unnecessary questions of a personal nature should be avoided in the jury selection process unless they are absolutely necessary to determine whether an individual can be fair and impartial. *But see In re The South Carolina Press Association*, 946 F.2d 1037 (4th Cir. 1991); Timothy R. Murphy, et al., *A Manual for Managing Notorious Cases* (1992).

⁹ For example, Minnesota has placed on the jury summons form a statement that informs the prospective juror that information provided on the qualification questionnaire will be made available to the court, the attorneys and the parties. It also states that after one year the information becomes a public record. Thus the legislature has insured that the lack of privacy for the information is known to the juror.